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8
9 UNITED STATES BANKRUPTCY COURT
10 FOR THE DISTRICT OF OREGON

11 In Re:)
12)
12 MELISSA CLARK,) Bankruptcy Case
13) No. 06-62407-aer13
13 Debtor.)
14)
14 DAVID C. & MARY C. HOUTS,) Bankruptcy Case
15) No. 08-62216-aer13
15 Debtors.)
16)
16 DONALD & JOLEE TAYLOR,) Bankruptcy Case
17) No. 08-62785-aer13
17 Debtors.)
18)
18 TED C. & JUDY A. BERGE,) Bankruptcy Case
19) No. 09-61563-aer13
19 Debtors.)
20)
20 PHILLIP K. & KELLY D. GALLOWAY,) Bankruptcy Case
21) No. 09-61595-fra7
21 Debtors.)
22)
22 KRISTI B. CARAWAY,) Bankruptcy Case
23) No. 09-61596-aer7
23 Debtor.)
24)
24 SAMUEL T. & BEVERLY A. BARNARD,) Bankruptcy Case
25) No. 09-61605-aer7
25 Debtors.)
26)

MEMORANDUM OPINION-1

1	DAVID A. CHILSON,)	Bankruptcy Case
2)	No. 09-61553-aer7
3	Debtor.)	
4	JAMES D. MOONEY,)	Bankruptcy Case
5)	No. 09-61608-aer13
6	Debtor.)	
7	RAYMOND L. & KATHLEEN A. WELLER,)	Bankruptcy Case
8)	No. 09-61567-aer13
9	Debtors.)	
10	JUSTIN D. WILSON,)	Bankruptcy Case
11)	No. 09-61309-aer13
12	Debtor.)	
13)	MEMORANDUM OPINION

This matter comes before the court on orders to show cause in each of the above-captioned cases why attorney Keith Hayes' fees should not be reduced or denied and why his current suspension should not be continued for an additional 90 days. An evidentiary hearing was held on August 3, 2009, after which the matters were taken under advisement.

Background:

On March 26, 2009, this court entered its Memorandum Opinion and Order in Clark, Houts and Taylor suspending attorney Keith Hayes from practice before the United States Bankruptcy Court for the District of Oregon for 90 days (**the March 26th Order**). Under the March 26th Order, the suspension began 60 days from the Order's entry (**the grace period**). During the grace period Mr. Hayes was permitted to take appropriate action to conclude his existing cases or find substitute counsel; he could not, however, file new cases. In addition, as part of the March 26th order, in the Clark case, Mr. Hayes was ordered to disgorge \$2,950 to the Chapter 13 Trustee and \$750 to legal insurer ARAG, North America,

1 Inc. by April 20, 2009, all without prejudice to any claims Ms Clark may
2 have to the funds.

3 On March 31, 2009, Mr. Hayes filed an Amended Motion to Modify
4 the March 26th Order (**the Amended Motion**). The Amended Motion sought
5 authority to file new cases through April 6, 2009. In support of the
6 Amended Motion Mr. Hayes filed a Declaration stating in pertinent part:

7 1. I became aware of the Court's [March
8 26th] order in this case on March 31, 2009 while
checking ECF electronic notification

9 2. At this time, I have a number of clients who
10 have significant financial issues with time
11 pressure on them who need to file for relief
under the bankruptcy code. They are clients who
12 have pending garnishments, foreclosure dates and
pending lawsuits.

13 3. If the cases are not filed in the immediate
14 future, those persons will lose money through
garnishment or other seizure, or lose property
through foreclosure.

15 4. Because of the deadlines involved, it would
16 be logistically impossible for them to find
substitute counsel or file the cases pro se with
17 the deadlines they are facing.

18 5. Because of the risk of financial hardship and
19 loss involved, and the difficulty of finding
substitute counsel, I am asking that the Court
20 modify the [March 26th] Order to provide for an
effective date of April 6, 2009.

21 6. This is to allow the filing of cases for
22 persons who previously retained me prior to the
date of the [March 26th] order and who have a
significant deadline approaching.

23 7. This declaration is made in good faith, is
24 based on personal knowledge, and not made for
the purpose of delay.

25 Based on the Amended Motion and Declaration, this court entered
26 an order on April 1, 2009, allowing Mr. Hayes to file new cases through

1 April 3, 2009, but all other provisions of the March 26th Order remained
2 in effect.

3 The New Cases:

4 Between April 1, and April 3, 2009, Mr. Hayes filed 35 cases on
5 behalf of debtors, 30 under Chapter 7 of the Bankruptcy Code and 5 under
6 Chapter 13. Among them were Berge (Chapter 13); Galloway, (Chapter 7);
7 Caraway (Chapter 7; Barnard (Chapter 7); Chilson (Chapter 7); Mooney
8 (Chapter 13); and Weller (Chapter 13) (collectively, **the new cases**). Mr.
9 Hayes did not notify his clients in the new cases that he had been
10 suspended.

11 The schedules, statements of financial affairs, plans, proofs of
12 claims and other documents filed in the new cases indicate:

13 a) no tax debt subject to collection by levy or otherwise;

14 b) no secured debt, no delinquent secured debt or no intent
15 by the debtor(s) to retain the collateral;

16 c) no lawsuits or administrative proceedings to which the
17 debtor was a party within one year of the petition, and no
judgments obtained by creditors before the one year; and

18 d) no property attached, garnished or seized under any legal
19 or equitable process within one year of the petition and no
20 indication that any continuing garnishment, attachment,
execution, seizure, forced sale, or levy was pending on the date
of the petition.

21 From the evidence adduced, this court is clearly convinced there
22 was no immediate need or exigency to file any of the new cases.¹

23 _____
24 ¹ At the August 3rd hearing, Mr. Hayes testified the Galloways were behind
25 or unable to make their mortgage payments, although he admitted there was no
foreclosure proceeding in progress. He believed a Chapter 7 filing could delay
26 foreclosure, thereby buying them time to move, catch-up the payments, or work
out a loan modification. He testified the Wellers filed their case because the
(continued...)

1 In the new Chapter 7 cases, Mr. Hayes charged his normal flat fee
2 of \$850 and collected either all or a portion of it before the filing.
3 In the new Chapter 13 cases, Mr. Hayes charged his normal flat fee of
4 \$4,000 for the entire case and collected \$500 before filing, with the
5 remainder to be paid through the Chapter 13 plan.

6 In the new Chapter 7 cases, the meetings of creditors required
7 under 11 U.S.C. § 341(a)² (**meetings**) were set in Salem, Oregon, on May
8 29, 2009. This was during Mr. Hayes' suspension. Mr. Hayes was aware of
9 this setting, at the latest, on April 3, 2009 (Chilson), and April 6,
10 2009 (Galloway, Caraway and Barnard), when he received e-service of the
11 notice of bankruptcy filing with the meeting date thereon. Mr. Hayes
12 contracted with attorney R. Brooke Holstedt to appear for him at the
13 meetings,³ however he waited until a day or two before the meetings to
14 transfer the case files to Mr. Holstedt and then only went over about
15 half of the files with him.

16 In the new Chapter 13 cases, the confirmation hearing was set for
17 June 16, 2009. Mr. Hayes received e-notice thereof on April 3, 2009
18 (Berge and Weller), and April 6, 2009 (Mooney), respectively. On May 13,

19 _____
20 ¹(...continued)
21 amount of their debt created a financial hardship, putting pressure on their
22 monthly budget for other expenditures. The court finds neither of these
23 circumstances constitute an emergency or exigency. In fact, Mr. Weller
24 testified his payments to secured creditors were current and there was no
emergency. As to the five other new cases, at the hearing, Mr. Hayes proffered
no evidence at all as to any exigency or emergency pending when they were
filed. In fact he testified he had not even reviewed the files in preparation
for the hearing.

25 ² Unless otherwise indicated, all subsequent statutory references are to
26 Title 11 of the United States Code.

³ Mr. Hayes testified he would be paying Mr. Holstedt from his own funds.

1 2009, Mr. Hayes received notice that the confirmation hearing in each
2 case had been reset to June 25, 2009. Both of these dates were during
3 Mr. Hayes' suspension. Mr. Hayes did not advise his clients that if
4 objections to confirmation were filed, he would not be able to attend the
5 confirmation hearings. Mr. Weller testified that he first learned of Mr.
6 Hayes' suspension when he called the Chapter 13 Trustee's office before
7 the June 25th hearing to discuss modifications to the plan. Mr. Weller
8 further testified that he had attempted to contact Mr. Hayes beforehand
9 to discuss the Trustee's pending objections to confirmation but his calls
10 were not returned. This court finds Mr. Weller's testimony to be
11 credible.

12 In Mooney and Berge, no objections to confirmation were filed,
13 accordingly, the confirmation hearing was not held. In Weller, ninety
14 minutes before the June 25th hearing, Mr. Hayes faxed a letter to the
15 court requesting that confirmation hearings that morning, in cases in
16 which he was attorney of record, be continued. The letter stated Mr.
17 Hayes was working on finding substitute counsel for his clients and that
18 Mr. Holstedt, whom he had been working with, was not available for that
19 day's hearings. The Wellers appeared pro se at the hearing. The court
20 set the matter over to allow them to procure new counsel.⁴

21 Wilson:

22 The Wilson Chapter 7 case was filed through Mr. Hayes on March
23 26, 2009. Mr. Hayes charged and received his normal flat fee of \$850.
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25

26 ⁴ After the August 3rd hearing, a minute order was entered requiring Mr.
Hayes to refund within 28 days all fees (\$500) received in the Weller case.

1 On June 5, 2009, the Office of the United States Trustee (**UST**)
2 moved to dismiss the case under § 707(b) as an abuse of the provisions of
3 Chapter 7. Before then the UST had repeatedly attempted, unsuccessfully,
4 to contact Mr. Hayes to discuss the motion and obtain documents.

5 On June 9, 2009, Mr. Hayes received e-mail notice of a July 15,
6 2009, hearing on the UST's motion. The July 15th hearing was duly
7 convened. At the time, the court's docket indicated no substitution of
8 counsel for Mr. Hayes. No one appeared at the hearing on Mr. Wilson's
9 behalf. Mr. Hayes has offered no evidence as to why substitute counsel
10 had not been procured.

11 Clark:

12 Mr. Hayes has not disgorged \$2,950 to the Chapter 13 Trustee in
13 Clark as required by the March 26th Order. He testified he was
14 attempting to work out an agreement with the Trustee to make payments
15 from monies due him on other cases.⁵ He offered no other excuse or
16 justification (such as inability) for his failure to abide. In light of
17 the fact that Mr. Hayes filed 35 cases by April 3, 2009 (and likely
18 collected some fees in each case, as was his practice) this court infers
19 that he did have the financial ability to comply with the March 26th
20 Order but willfully chose not to do so.

21 Discussion:

22 The UST has recommended that all of Mr. Hayes' fees be denied in
23 the matters at bar and that he be suspended for an additional 90 days.
24 For the reasons that follow, this court adopts the UST's recommendations.

25
26 ⁵ This, in total disregard of the March 26 order which required payment by
April 20, 2009.

1 Fee Disgorgement:

2 The court may examine the reasonableness of Mr. Hayes'
3 compensation under § 329(b). "Reasonableness" under § 329(b) is measured
4 by § 330's standards. American Law Ctr. PC v. Stanley (In re Jastrem),
5 253 F.3d 438, 443 (9th Cir 2001). The court considers the nature, extent
6 and value of services rendered taking into account all relevant factors
7 including those set out in § 330(a)(3), and excluding those services
8 described in § 330(a)(4)(A). If the compensation exceeds the reasonable
9 value of the services, the court may cancel the agreement or order
10 disgorgement of any fees, to the extent excessive, to the estate (if the
11 fees would have been estate property or were to be paid under a Chapter
12 . . . 13 plan), or to the debtor. § 329(b)(1)-(2).

13 Even before he filed the new cases, Mr. Hayes was (or should have
14 been) aware the meetings could and the confirmation hearings would, be
15 set during his suspension.⁶ By April 6, 2009, his inability to
16 participate in these important hearings was confirmed by court notice.⁷

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18 ⁶ The debtors in the new cases reside either in Polk or Marion County.
19 Because the UST does not staff an office in those counties, meetings may be set
20 up to 60 days from the petition's filing. FRBP 2003(a). In turn, confirmation
21 hearings are set 20 to 45 days from the meeting. § 1324(b)

22 ⁷ Mr. Hayes filed his required fee disclosures in the new Chapter 7 cases
23 on April 19, 2009. In the Chapter 13 cases he filed them on April 20, 2009
24 (Mooney and Berge) and April 26, 2009 (Weller) respectively. His disclosures
25 (and fee agreements where attached) provided he would represent his clients at
26 the meeting, and in the Chapter 13 cases, at the confirmation hearing. By the
time the fee disclosures were filed however, Mr. Hayes was aware these hearings
fell within his suspension and that he would have to procure substitute
counsel. A debtor's attorney has a duty under FRBP 2016 and § 329(a) to
disclose the precise nature of his fee arrangement. In re Addison, 2008 WL
1902429, *4 (Bankr. D. Or. 2008). While failing to advise the court
(continued...)

1 Given these circumstances, it was inappropriate to charge and collect his
2 normal flat fee.

3 The first three to four months in any Chapter 7 case are pivotal
4 for debtors. The meeting is held. FRBP 2003(a). The case trustee
5 scrutinizes the debtor's schedules and statement of affairs, often
6 requesting follow-up information. Many times the trustee makes demand
7 for turnover of non-exempt assets. The UST conducts its review for abuse
8 under § 707(b), which may lead to the filing of a motion to dismiss.
9 FRBP 1017(e)(1). Parties in interest examine grounds under § 727 to deny
10 the debtor's full discharge, FRBP 4004(a), or grounds under § 523 to
11 except particular debts from discharge. § 523(c); FRBP 4007(c). In
12 Chapter 13, the debtor's payment plan is before the court for
13 confirmation. Objections to confirmation of the plan are addressed.
14 Plan amendments are negotiated. If plan confirmation is contested, a
15 confirmation hearing is held. All of these activities involve
16 interactions with the debtor. All of them have serious downside risks.
17 Debtors employ counsel to protect them from such risks. When counsel
18 charges and collects his "normal flat fee" yet knows, in advance, he must
19 "disappear" for 3 months less than 60 days from the case's filing, that
20 clearly constitutes an unreasonable fee arrangement. The events in
21 several cases at bar bear this out.

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24 ⁷(...continued)
25 substitute counsel would participate in the meetings may not rise to the level
26 of sanctionable conduct, it provides yet another indicia of Mr. Hayes' cavalier
attitude toward his duties to the court and his clients.

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1 As noted above, the meetings in the new Chapter 7 cases fell
2 during Mr. Hayes' suspension. While he did engage Mr. Holstedt to cover
3 for him, Mr. Hayes only delivered his clients' files one to two days
4 beforehand and then only went over half of them with Mr. Holstedt. In
5 Wilson, Mr. Hayes was unavailable to address the UST's § 707(b) inquiries
6 and left his clients unrepresented at the July 15th hearing. In the new
7 Chapter 13 cases, Mr. Hayes was able to attend the meetings. In Weller,
8 however, his suspension barred him from attending the confirmation
9 hearing, yet again he found no one to substitute for him.

10 In addition, one must bear in mind that, but for Mr. Hayes'
11 deceitful Declaration, he would not have gained the extension to file the
12 new cases in the first place; thus he would not have charged or collected
13 the subject fees. This court is loathe to allow him to profit from his
14 own deceit.

15 In light of the above, this court will cancel the fee agreements
16 in each of the new cases as well as in Wilson. Mr. Hayes will be ordered
17 to refund all fees received to the respective debtors within 28 days.⁸
18 This refund is without prejudice to the case trustee(s) making a claim to
19 the funds. Within 42 days Mr. Hayes is to file a declaration stating
20 either that (1) he has made the requisite refunds; or (2) explaining in
21 detail why he has not. He is also barred from collecting any future fees
22 in the new cases and Wilson.

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25 ⁸ The Weller fees are the subject of a previous order. See f.n. #4, *supra*.
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1 Suspension:

2 Bankruptcy courts have the inherent power to suspend an attorney
3 provided the attorney is accorded due process. Price v. Lehtinen et.
4 al.(In re Lehtinen), 564 F.3d 1052 (9th Cir. 2009); see also, In re
5 Brooks-Hamilton, 400 B.R. 238, 248-249 (9th Cir. BAP 2009)(noting § 105
6 and FRBP 9011 as additional sources of a bankruptcy court's power to
7 suspend). In determining reasonable discipline, the court must apply the
8 American Bar Association (ABA) Standards.⁹ Id. at 252. The standard of
9 proof in disciplinary proceedings is "clear and convincing." Peugeot v.
10 United States Trustee (In re Crayton), 192 B.R. 970, 975 (9th Cir. BAP
11 1996).

12 Under the ABA Standards, to determine an appropriate sanction,
13 the court should consider:

- 14 (1) whether the duty violated was to a client,
15 the public, the legal system or the profession;
16 (2) whether the lawyer acted intentionally, knowingly
17 or negligently;
18 (3) whether the lawyer's misconduct caused a
19 serious or potentially serious injury; and
20 (4) whether aggravating factors or mitigating
21 circumstances exist.

22 Brooks-Hamilton, supra at 252.

23 The threshold inquiry is whether a duty was violated. In
24 addition to the duties imposed by the Bankruptcy Code and Rules,
25 attorneys practicing before this court must comply with the standards of
26

25 ⁹ ABA Standards for Imposing Lawyer Sanctions (as amended in 1992) (ABA
26 Standards).

1 conduct required of members of the Oregon State Bar. LBR 9010-
2 1(a)(2)(A)(incorporating LR 83.7(a)).

3 In United States Trustee v. Lynn (In re Bellows-Fairchild), 322
4 B.R. 675 (Bankr. D. Or. 2005) the court permanently enjoined an attorney
5 from practicing in bankruptcy court for violating his duty to accurately
6 and completely prepare the debtor's schedules and statement of financial
7 affairs. Similarly, in Brooks-Hamilton, supra the trial court based a
8 six month suspension on a finding under FRBP 9011 that an objection to
9 claim was frivolous and filed for an improper purpose.¹⁰

10 Here, Mr. Hayes violated duties to the court, the legal system in
11 general, the profession, the public, his clients and other parties in
12 interest by:

13 1) falsely representing in his Declaration in support of the
14 Amended Motion that there was an immediate need for filing the
15 new cases, in violation of FRBPs 9011(b)(1)(motion must not be
16 filed for improper purpose), and 9011(b)(3)(motion's factual
17 contentions must have evidentiary support), and Oregon Rules of
18 Professional Conduct (ORPC) 3.3(a)(1)("a lawyer shall not
19 knowingly make a false statement of fact . . . to a tribunal" or
20 fail to correct same); 3.3(a)(3)("a lawyer shall not knowingly
21 offer false evidence"); 8.4(a)(3)(a lawyer shall not engage in
22 conduct involving dishonesty that reflects adversely on lawyer's
23 fitness to practice); and 8.4(a)(4)(a lawyer shall not engage in
24 conduct prejudicial to the administration of justice);

25 2) requesting, while suspended, a continuance of the June
26 25, 2009, confirmation hearings, in violation of ORPC 5.5(a)(a
lawyer shall not practice law in violation of the subject
jurisdiction's regulation of the legal profession);

3) failing to advise his clients of his suspension and
failing to facilitate the retention of substitute counsel, in

¹⁰ In Brooks-Hamilton, the Appellate Panel remanded because the trial
court did not consider the ABA standards in determining the extent of the
sanction; however, it upheld the finding that some discipline was appropriate.

1 violation of Oregon State Bar Rule of Procedure (BR) 6.3(b) (a
2 suspended lawyer must immediately take all reasonable steps to
3 avoid foreseeable prejudice to any client); and ORPCs 1.3 (a
4 lawyer shall not neglect a legal matter entrusted to him); and
5 1.4(a) ("a lawyer shall keep a client reasonably informed about
6 the status of a matter"). See also; Matter of Kraus, 295 Or.
7 743, 670 P.2d 1012 (1983) (in appropriate circumstances,
8 suspended attorneys have a duty to advise clients of suspension);

9 4) charging his normal fees, in violation of § 329(b) and
10 ORPC 1.5(a)(a lawyer shall not enter into an agreement for,
11 charge or collect a clearly excessive fee); and

12 5) willfully failing to abide by the March 26th Order to
13 disgorge \$2,950 to the Chapter 13 Trustee.

14 The court next examines Mr. Hayes' mental state at the time of
15 the misconduct. Under the ABA Standards an attorney can act
16 "intentionally," "knowingly," or "negligently." "'Intent' is the
17 conscious objective or purpose to accomplish a particular result." ABA
18 Standards (Definitions). "'Knowledge' is the conscious awareness of the
19 nature or attendant circumstances of the conduct but without the
20 conscious objective or purpose to accomplish a particular result." ABA
21 Standards (Definitions). "'Negligence' is the failure of a lawyer to
22 heed a substantial risk that circumstances exist or that a result will
23 follow, which failure is a deviation from the standard of care that a
24 reasonable lawyer would exercise in the situation." ABA Standards
25 (Definitions).

26 The court finds Mr. Hayes acted "intentionally." In In re
27 Conduct of Campbell, 345 Or. 670, 687, 202 P.3d 871, 881 (2009), the
28 Oregon Supreme Court held a finding of "intentional" conduct requires a
29 showing that "the result the accused intended was not the act taken but
30 the harmful (to others) or beneficial (to the accused) effect of that

1 act." Here, Mr Hayes, purely for his own economic gain (that is, to
2 collect more and clearly excessive fees), intentionally misled the court
3 as to the necessity of immediately filing the new cases. In failing to
4 advise his clients of his suspension, he intended to protect his
5 reputation (and prospects for future fees) at the expense of candor and
6 full disclosure to his clients. In failing to procure substitute counsel
7 in Wilson and Weller, he intentionally neglected his clients. By failing
8 to pay the funds ordered disgorged in Clark, he again protected his own
9 pocketbook at his clients' and their creditors' expense.

10 Next, the court examines whether Mr. Hayes' misconduct caused a
11 serious or potentially serious injury. "'Injury' is harm to a client,
12 the public, the legal system, or the profession which results from a
13 lawyer's misconduct." ABA Standards (Definitions). Here, Mr. Hayes'
14 conduct caused serious injury. His intentionally false Declaration
15 seriously undermined the integrity of the bankruptcy system as well as
16 the legal system as a whole, Lynn, supra at 682, as did his practice of
17 law while suspended and his intentional failure to abide by the March
18 26th disgorgement order. His intentional neglect caused serious or
19 potentially serious injury to his clients. His collection of excess fees
20 seriously injured both his clients and their creditors.

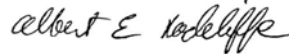
21 Finally, the court must consider whether aggravating factors or
22 mitigating circumstances exist. Aggravating factors are "considerations
23 or factors that may justify an increase in the degree of discipline to be
24 imposed." ABA Standard 9.21. Here, multiple aggravating factors are
25 present, including a dishonest or selfish motive, multiple offenses, a
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1 pattern of misconduct, prior disciplinary offenses¹¹ and indifference to
2 making restitution. ABA Standards 9.22 (a)-(d),(j). Mitigating factors
3 are "considerations or factors that may justify a reduction in the degree
4 of discipline to be imposed." ABA Standard 9.31. Mr. Hayes did not
5 advance any particular mitigating factor. The court has reviewed the
6 enumerated factors in ABA Standard 9.32 (a)-(m) and finds that none
7 apply.

8 Considering all the relevant ABA standards, the court determines
9 that a suspension of 90 days, beginning August 24, 2009, is
10 appropriate.¹²

11 The above constitutes the court's findings of fact and
12 conclusions of law under FRBP 7052. An order consistent herewith shall
13 be entered.

14 

15 ALBERT E. RADCLIFFE
16 Bankruptcy Judge
17

18 ¹¹ Mr. Hayes' prior transgressions are set out in detail in In re Clark,
19 2009 WL 936666 (Bankr. D. Or. 2009) and In re Addison, 2008 WL 1902429 (Bankr.
20 D. Or. 2008).

21 ¹² Ninety days was the maximum period noticed in the Orders to Show Cause
22 and thus the court is bound by this limit. However, under the ABA Standards, a
23 more severe sanction is probably indicated. See, ABA Standards 2.3
24 (suspensions should generally be a minimum of six months); 4.41(c) (disbarment
25 is generally appropriate for pattern of neglect causing serious injury);
26 6.11(disbarment is generally appropriate for intentional false statements to
the court causing serious injury or significant adverse effect on legal
proceeding); 8.1(b)(disbarment is generally appropriate for intentional
misconduct causing injury after prior discipline for similar misconduct); 6.21
(disbarment is generally appropriate for a knowing violation of court order
with intent to benefit personally, which causes serious injury).